

Supreme Court says ‘open wide’ to North Carolina teeth-whitening business

By Michael Doyle

February 25, 2015

WASHINGTON — The Supreme Court on Wednesday effectively rejected North Carolina’s tight control over the lucrative teeth-whitening business.

In a divided decision that polishes up the court’s free market credentials, six justices agreed the Federal Trade Commission can charge the dentist-dominated North Carolina State Board of Dental Examiners with “anticompetitive and unfair” actions.

“Active market participants cannot be allowed to regulate their own markets free from antitrust accountability,” Justice Anthony Kennedy wrote.

The court’s 6-3 decision did not, by itself, explicitly strike down the North Carolina teeth-whitening regulations that restrict the work to dentists. The decision does, though, reject the North Carolina board’s argument that it enjoyed immunity from the Federal Trade Commission filing charges.

Federal antitrust law generally prohibits individuals or businesses from collaborating to repel competition. But in a 1943 case involving California raisins, the Supreme Court specified that state-authorized entities could be exempt from the usual antitrust limitations. To qualify, the entity, such as a regulatory board, must pursue a “clearly articulated state policy” and must be “actively supervised” by the state.

The crucial 1943 case allowed the raisin industry, acting through the state, to regulate the handling and pricing of the crop. In its decision Wednesday, the Supreme Court concluded North Carolina’s dental board was different.

“Here, the board did not receive active supervision by the state,” Kennedy wrote.

North Carolina dentists began teeth-whitening services in the 1990s. By 2003, non-dentist providers began offering the same service in spas and salons. They charged less, prompting dentists to complain to the state board, which subsequently issued cease-and-desist orders to the non-dentists.

The state board also wrote malls and other businesses, urging them not to lease space to non-dentists who provided teeth whitening. Some letters warned that the unauthorized practice of dentistry was a misdemeanor subject to criminal prosecution.

While North Carolina state law defines the practice of dentistry to include the “removal of stains, accretions or deposits from the human teeth,” the state law is silent about the modern use of peroxide to whiten teeth.

The Federal Trade Commission filed a complaint against the North Carolina board in 2010.

The North Carolina State Board of Dental Examiners has certain state elements. It is overseen by a state legislative committee, the board members swear oaths and they file financial disclosure statements. Currently, the board has licensed about 5,600 dentists and about 7,500 dental hygienists.

However, the board is funded by industry fees rather than taxpayer dollars, and six of the eight members are dentists selected by industry representatives. Supporters say it makes sense to have dentists watch over their own industry, because they bring both expertise and cost-savings. Skeptics worry about a conflict of interest that may harm consumers.

“Limits on state-action immunity are most essential when the state seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives,” Kennedy wrote.

Licensing boards now regulate some 800 professions, according to a legal brief filed by the group Public Citizen. The Sacramento, Calif.-based Pacific Legal Foundation and the libertarian Cato Institute noted, for instance, that 19 states require licenses for interior designers.